

2/8/10 ⑦

## TOWN OF ACTON

# Memo

**To:** Board of Selectmen

**From:** Steven L. Ledoux, Town Manager 

**Date:** February 5, 2010

**Re:** Military Pay Differential

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### BACKGROUND

In 2003, The State Legislature enacted Chapter 137 of the Acts of 2003, which if accepted by the Town through Town meeting, allows Town Employees who were called to active duty after September 11, 2001, to be paid the differential between their military pay and their pay as a Town Employee. This Act was passed in response to the War on Terror. The provisions of this Act (Attachment 1) expire on September 11, 2011.

### IMPACT ON THE TOWN

We are still ascertaining the total impact if this Act were adopted. We know we have two eligible employees on the Town side. One employee is current and the financial cost of his situation is \$7,916. The other employee has left Town employ and we are trying to track down more information on him.

Since adopting this Act would also affect APS, we are trying to ascertain from Marie Altieri what that total potential impact could be. We hope to have that information for Monday evening.

### OTHER OPTIONS

We have explored other options such as adopting a policy as opposed to the State statute. In Attachment 2, there are two versions that we have put together. Attachment 3 is from the Teacher Contract. The advantage of a policy is that it can be changed from time to time and amended as the circumstances dictate.

However, Attachment 4 is a preliminary review of our draft policies. As indicated, such policy could result in challenges, although we may be able to draft something tighter to protect the Town more.

### **RECOMMENDATION**

I prefer the concept of a policy as opposed to accepting the State statute. As you can see from the first draft policy version, we broadened it to cover others who through training may be called to a FEMA situation that doesn't involve the Military. I recommend that we explore the policy idea further and return to the Board on February 22 with a Policy that Counsel is more comfortable with.

Attachment 1

## Chapter 137 of the Acts of 2003

### AN ACT RELATIVE TO PUBLIC EMPLOYEES SERVING IN THE ARMED FORCES OF THE UNITED STATES.

*Whereas*, The deferred operation of this act would tend to defeat its purpose, which is to protect forthwith the salaries of certain public employees who served or are serving in the armed forces, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

**SECTION 1.** Notwithstanding any general or special law to the contrary, an employee in the service of the commonwealth or a county, city or town that accepts this section as provided in this section, including an employee of a school district, who has been granted a military leave of absence because the employee is a member of the army national guard, the air national guard or a reserve component of the armed forces of the United States called to active service in the armed forces of the United States after September 11, 2001, shall be entitled to receive pay at his regular base salary as such a public employee, and shall not lose any seniority or any accrued vacation leave, sick leave, personal leave, compensation time or earned overtime. An employee eligible under this section shall be paid his regular base salary as such a public employee for each pay period of such military leave of absence after September 11, 2001, reduced by any amount received from the United States as pay or allowance for military service performed during the same pay period, excluding overtime pay, shift differential pay, hazardous duty pay or any other additional compensation. For the purposes of this section, the words "active service" shall not include active duty for training in the army national guard or air national guard or as a reservist in the armed forces of the United States. This section shall take effect in a county, city or town upon its acceptance in a county, by vote of the county commissioners; in a city or town, as provided in section 4 of chapter 4 of the General Laws; and in a regional school district, by vote of the school committee. Nothing in this section shall limit or reduce a person's entitlement to benefits under section 59 of chapter 33 of the General Laws, and nothing in this section shall entitle a person to benefits in excess of the maximum benefit provided under said section 59 of said chapter 33 for any period during which that person is receiving benefits under this section.

**SECTION 2.** Notwithstanding any general or special law to the contrary, state agencies and municipal governments may expend in the current fiscal year associated costs incurred in prior fiscal years pursuant to this act.

**SECTION 3.** Notwithstanding any general or special law to the contrary, any employee eligible for retirement under section 616 of chapter 26 of the acts of 2003 who was stationed outside of the commonwealth on active military duty during the period from July 15, 2003 through September 1, 2003, inclusive, shall file his application for retirement with the state board of retirement within 30 days of discharge from active military duty outside the commonwealth or within 30 days of the effective date of this act. The retirement date requested shall be no more than 60 days and no less than 30 days from the date said application is filed with the state board of retirement.

**SECTION 4.** Section 40N of chapter 7 of the General Laws, as appearing in the 2002 Official Edition, is hereby amended by inserting after the definition "Minority business" the following definition:-

## Call-up Pay Policy

### Version 1

Any active employee currently employed by the Town of Acton who serves in the military or is a member of an official federal or state organization recognized by the federal and state government for tax purposes, who are called to active duty may receive the difference between the base pay he/she is receiving from the military or an organization and his/her base salary from the Town. If it is a volunteer organization, the Town Manager may determine what rate the employee may be paid during such leave time.

### Version 2 Federal and State call up

If you have official orders calling you to duty by the Commonwealth of Massachusetts and/or the Federal Government. You are eligible to receive the following pay and health benefits:

- Health Insurance 31 days of coverage after leaving the service of the Town
- Pay – you are allowed to use available hours in your individual both vacation and sick time banks to offset the delta between your base Town wage (for example but not limited to -- without OT, details, and special stipends) and your actual state or federal government pay ( as evidenced by a governmental order or pay stub including any special duty pay).
- If you run out of both vacation and sick benefits the Town Manager, at his or her sole discretion The Town Manager (shall consider, but his or her judgement is not limited to these factors, prior sick time usage, employee performance, the Municipal Government's ability to fund, the impact upon the employees family), may multiply the beginning balance of vacation and sick time hours by a factor of 3 or 300%. For example if you had an unused balance of 10 hours vacation and 90 hours sick. The Town Manager may (but is not required to) increase it to an amount not to exceed 300 hours. Such a decision is not subject to any grievance or arbitration process.
- In addition to the amount of sick and vacation hours you begin with, you will continue to earn benefits during your call up period.

This policy is effective \_\_\_\_\_

Attachment 3

**Marianne Fleckner**

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**From:** Frank Widmayer  
**Sent:** Thursday, February 04, 2010 2:54 PM  
**To:** Marianne Fleckner  
**Cc:** Mark Hald  
**Subject:** From the school contract

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8.8 Military Leave

8.8.1 Military leave for up to four (4) years without pay as required by state or federal law shall be granted for Military Service. Reinstatement shall be subject to state and federal law and Article 12.

8.8.2 Leaves of absence with pay of up to a maximum of ten (10) days per school year may be granted by the Superintendent (or his or her designee), which approval shall not be unreasonably withheld, to persons called into temporary active duty of any unit of the U.S. Reserves or the State National Guard, provided such obligations cannot be fulfilled on days when school is not in session. Teachers will be paid the differences between their regular pay and the pay which they receive from the State or Federal Government.

2/5/2010

Steve Ledoux

**From:** Stephen D. Anderson [SAnderson@AndersonKreiger.com]  
**Sent:** Wednesday, February 03, 2010 7:54 PM  
**To:** Marianne Fleckner  
**Cc:** Steve Ledoux; John Murray  
**Subject:** Acton/GenSel: Call up Pay Policy

Attachment 4

Marianne:

In Chapter 137 of the Acts of 2003 and its extensions, the legislature has laid out a statute covering the optional adoption by cities and towns of a military pay differential for municipal employees. It provides a safe harbor for cities and towns – if it is adopted and followed, no one can challenge the differential benefits. In the absence of a lawful safe harbor, there conceivably could be challenges brought by other employees not receiving such benefits, ten taxpayers concerned about the fiscal expenditure, unions on behalf of members, or the like.

The opening phrase of c. 137, § 1 of the Acts of 2003 says "[n]otwithstanding any general or special law to the contrary" the employee is entitled to receive the benefits of the Act once adopted by the city or town. This phrase suggests that, in the absence of the Act (or a similar statutory provision such as G.L. c. 33, § 59 governing the effect of military service on salary or vacation allowance of public employees) there are or may be general or special laws effectively prohibiting such differential pay. Labor counsel can probably advise you off the top of his head as to what these impediments may be. But they would likely revolve around concerns as to (a) prohibition of discrimination and providing equal pay for equal work, (b) avoiding an *ultra vires* payment (where the town would be paying the employee for services *not* performed for the town but performed for the federal or state organization), (c) avoiding potential conflicts with charter provisions, personnel bylaws and/or union contracts, (d) determining entitlement to retirement benefits, seniority, accrued vacation leave, sick leave, personal leave, compensation time and earned overtime, to name a few.

Trying to finesse concerns the Town may have about c. 137, § 1 of the Acts of 2003 by adopting a "policy" leaves much more room for challenges as to the validity of the Town's actions because of these other concerns. This is particularly true where – as here – the draft delegates so much discretion to the Town Manager to determine who does and who does not get the benefits under the policy. Without researching the issue, I would think that the Town would be on much more solid footing by either (a) adopting the state Act, (b) seeking home rule legislation to accomplish the Town's purposes, or (c) adopting a home rule bylaw, rather than trying to accomplish these purposes with an employment policy.

This is just my immediate instinct on the subject. I am not saying it cannot be done, but you should approach this concept with caution. I would be happy to discuss the pros and cons of the policy further with you (with or without labor counsel's involvement in the call). Please let me know if you would like to do so.

Steve

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**From:** Marianne Fleckner [mailto:mfleckner@acton-ma.gov]  
**Sent:** Wednesday, February 03, 2010 6:06 PM  
**To:** Stephen D. Anderson  
**Cc:** Steve Ledoux; John Murray  
**Subject:** FW: Call up Pay Policy

Hello Steve,

As a follow-up to our ongoing discussion on military pay differential, we are now contemplating a policy instead of adopting the Chapter language. You'll see that we've named it, "Call up Pay Policy" as it may encompass more than just military pay differential.

2/5/2010

Attached are 2 versions of such policy. Our question to you:

Steve Ledoux will be having this discussion with the BoS next Monday night, 2/8/10. After reviewing these 2 draft policies, is there anything of importance that we should know about before Steve's discussion with the BoS Monday night? For example, are we stating something in either of the policies that may violate any state rule, law, policy, etc....?

*Marianne C. Fleckner*  
*Director of Human Resources*  
*Town of Acton*  
*472 Main Street*  
*Acton, MA 01720*  
*(978) 264.9603*

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**From:** John Murray  
**Sent:** Wednesday, February 03, 2010 3:14 PM  
**To:** Marianne Fleckner  
**Subject:** FW: Call up Pay Policy

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**From:** John Murray  
**Sent:** Monday, February 01, 2010 3:54 PM  
**To:** Steve Ledoux  
**Subject:** Call up Pay Policy

Attached are two versions for your consideration. Once we have your input, we will take it to Lauren. We believe the policies are structured to meet Paulina's concerns.

2/5/2010